U.S. Department of Labor

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Issue date: 21Mar2001

CASE NO.: 2000-LHC-2535

OWCP NO.: 15-40500

In the Matter of:

JAMES T. SULLIVAN

Claimant

v.

RAYTHEON ENGINEERS Employer

and

LIBERTY MUTUAL INSURANCE CO. Carrier

APPEARANCES:

Craig A. Alexander, Esquire For the Claimant

Kurt A. Gronau, Esquire For the Employer and Carrier

BEFORE: ROBERT J. LESNICK

Administrative Law Judge

<u>DECISION AND ORDER - AWARDING BENEFITS</u> AND DENYING SECTION 8(f) RELIEF

The above-captioned claim arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, (hereinafter "The Act"), as incorporated in the Defense Base Act, 42 U.S.C. § 1651 *et. seq* and the implementing regulations, 20 C.F.R. Parts 701, 702, and 704.101-151. The claim is brought by James T. Sullivan (hereinafter "Claimant") against Raytheon Engineers (hereinafter "Employer") and Liberty Mutual Insurance Co. (hereinafter "Carrier").

PROCEDURAL HISTORY

The Claimant filed his claim on November 13, 1996. Employer filed a Notice of Controversion on January 24, 1996. (EX 2) The Claimant seeks permanent partial disability benefits from September 11, 1996 to the present for a cumulative low back injury that manifested on November 12, 1996. (EX 2) On June 19, 2000, the Director, Office of Workers' Compensation Programs (hereinafter "OWCP"), referred this claim to the Office of Administrative Law Judges for a formal hearing.

A hearing was conducted in Birmingham, Alabama on September 21, 2000 at which time all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the Regulations. During the hearing Claimant's Exhibits 1 through 13, Employer's Exhibits 1 through 8, and Administrative Law Judge's Exhibits 1 and 2 were received in evidence.

No additional evidence was submitted post-hearing. All of this evidence has been made part of the record.

STIPULATIONS

The parties have stipulated to the following facts. Accordingly, I find that:

1.) This claim is covered by the Defense Base Act extension to the Act. ²

¹ The following abbreviations have been used in this opinion: EX = Employer's exhibits; CX = Claimant's exhibits; ALJX = Court exhibits; TR = Hearing Transcript.

² The parties have stipulated to the fact that the Defense Base Act applies to the above-captioned claim. I agree that the Defense Base Act is applicable here, and by extension the Act is also applicable. The Defense Base Act applies to "the injury or death of any employee engaged in any employment ... under a contract entered into with the United States or any executive department, independent establishment, or agency thereof ... where such contract is to be performed outside the continental United States ... for the purpose of engaging in public work." 42 U.S.C. § 1651.

- 2.) The Claimant sustained a compensable accident to his low back while in the employ of the Employer. ³
- 3.) The Claimant's average weekly wage ("AWW") is \$1,984.06.
- 4.) The maximum compensation rate in effect at the time of the Claimant's injury was \$782.44.

<u>ISSUES</u>

- 1.) Whether the Claimant is permanently and partially disabled due to his work related low back injury?
- 2.) Whether the Employer should pay the Claimant's medical expenses pursuant to Section 7 of the Act?
- 3.) Whether the Employer is entitled to relief under Section 8(f) of the Act?

Findings of Fact and Conclusions of Law

Background

Claimant completed the eleventh grade, obtained a GED certificate, and earned an Associate in Arts degree. The Claimant retired from the United States Army as a Sargent-Major (E-9) in 1991 after 30 years of service. (TR 19) The Claimant worked for Employer from May, 1991 until September, 1996. (TR 19) The Claimant worked for Raytheon Engineers as a hazardous waste coordinator at the Johnston Atoll facility. Johnston Atoll is a plant engineered to decommission chemical weapons that are no longer needed. (TR 25) The island is located 800 miles southwest of Honolulu, Hawaii. (TR 19, 25)

As a hazardous waste coordinator, the Claimant was to dispose of "all the processed, non-processed, hazardous waste and non-hazardous waste" by thermal decontamination. (TR 26) The Claimant worked as part of a three person "team" that operated on an eight week rotation. (TR 27) The Claimant's primary duties at Johnston Atoll included conducting plant inspections, inspecting waste collection areas, and moving waste which included marking and weighing the waste. (TR 27) The Claimant's position on Johnston Atoll required consistent use of a forklift to move the waste on the island. (TR 29) The most demanding physical labor that was required of the Claimant was to move "55 gallon steel drums." (TR 30)

On November 12, 1995, the Claimant began to experience low back and leg problems

³ The Claimant has withdrawn the issue of whether his venous insufficiency condition is compensable and as such, the venous insufficiency condition will not be discussed further.

while working on Johnston Atoll. (TR 36) The onset of symptoms was gradual eventually manifesting to the point where the Claimant visited the site medic. (TR 38-39) The Claimant was transported off of Johnston Atoll and did not return for seven weeks. (TR 40)

Hearing Testimony

Claimant's Testimony

The Claimant testified at the formal hearing as to the nature of his employment with Raytheon Engineers, as well as his injury. The Claimant stated that he was a career soldier before becoming employed by Raytheon Engineers. (TR 19) When Claimant left military service, he was awarded 30% disability benefits. These benefits covered tinnitus, duodenitis, diverticulitis, a broken right elbow, and a torn right rotator cuff. (TR 20) The Claimant testified that he did not sustain any service related low back disability. (TR 21) The Claimant was required to undergo a pre-employment physical examination before becoming employed with Employer. (TR 22) At that time, no back problem was detected. (TR 22)

The Claimant arrived at Johnston Atoll on May 29, 1991. (TR 23) Working on Johnston Atoll required an annual physical examination in order to remain employed. (TR 23-24) The Claimant was consistently approved during these medical examinations to perform his work duties. (TR 24) The Claimant then testified to the basis of his salary. The Claimant stated that he received a base salary that was increased by 20% for taking an assignment on a remote island. Additionally, the base salary was increased by 30% at the end of the Claimant's 25 week contract as a "completion bonus." (TR 31) Claimant testified that at the beginning of his employment with Employer, there was only one standard forklift at Johnston Atoll. (TR 32-33) The road on which the Claimant drove this forklift was bumpy and driving would cause the Claimant's head to hit the roof of the forklift cage. (TR 35)

Claimant went on to testify that he began experiencing back problems in mid-1995. (TR 36) The Claimant also began to experience swelling in his leg. (TR 38) The Claimant's injuries forced him to leave Johnston Atoll for seven weeks. (TR 39) During that time, the Claimant was seen by Drs. Morris and Bowles. (TR 40) After that seven week period, the Claimant returned to Johnston Atoll, but was placed on restricted duty. The Claimant was prevented from performing his normal work duties, because he could not operate the forklift nor could he move any drums. (TR 41)

A short term disability claim was filed by the Claimant based on the Claimant's injuries to his back and leg. (TR 43) When the Claimant returned to Johnston Atoll activities such as lifting, turning, bending, standing and sitting for long periods of time, and climbing stairs aggravated his back injury. (TR 50) The Claimant further testified that he decided to leave Johnston Atoll at the end of his contract because he was unable to perform the duties of his job. (TR 51)

After leaving Johnston Atoll, the Claimant was unemployed for six months. (TR 56)

Claimant then began working as a custodian at a local school for approximately one year. (TR 59) This position was initially part-time work, but progressed into a full time position. (TR 59) The starting salary for this position was \$6.00 per hour, but was raised to an unspecified amount when the position became full time. (TR 59) Claimant was subsequently hired by Westinghouse-Anniston as a control room operator in April, 1999. (TR 60). The Claimant's present position is a sedentary job. (TR 60). Claimant's starting salary at Westinghouse-Anniston was \$15.45 per hour, but has since been increased to \$20.40 per hour. (TR 62) The Claimant further testified that he has not received any compensation benefits from Employer. (TR 63) The plant where Claimant now works is preparing to do munition decommissioning. (TR 62) Claimant went on to testify that he was referred to Dr. Hrynkiw for his back problem. (TR 65)

On cross examination, Employer's counsel read a letter, signed by the Claimant that reported that the Claimant had a previous back injury on November 6, 1991. (TR 70-71) The Claimant stated that he was not required to be absent from work because of the 1991 injury. (TR 73) The Claimant explained that he listed several potential problems areas on his application for military disability benefits so that certain conditions could be ruled out. (TR 76) The Claimant stated further that he intended to leave Johnston Atoll at the time of his contract expiration. This was the Claimant's intent because he felt that he was physically unable to perform his job duties. (TR 84) In this vain, the Claimant voluntarily resigned in September, 1996, giving Employer notice in May or June of 1996. Claimant stated that he did not mention that he was leaving Johnston Atoll because of his back problem because the Claimant felt that mentioning the back problem would "disparage" the company and the Claimant did not want that to happen. (TR 87)

Claimant went on to state that he was offered a supervisory position on Johnston Atoll, but that the position had the same responsibilities as the hazardous waste coordinator position and as such, the Claimant would be unable to perform the physical requirements of the job. (TR 89) Claimant trained his replacement because the Claimant stated that he did not want to leave Employer without a capable employee. (TR 91)

Testimony of Howard Leon Carmack

Mr. Howard Leon Carmack was present at the September 21, 2000 hearing and testified in the following manner. Mr. Carmack was the Claimant's supervisor on Johnston Atoll between 1988 and 1990 and again from 1991 to 1996. (TR 98-99) Mr. Carmack testified that if only one hazardous waste coordinator was present at Johnston Atoll, he was required to perform manual labor, as well as performing supervisory duties. (TR 101) Mr. Carmack had met the Claimant 15 to 20 years before the date of the hearing. (TR 98) Mr. Carmack stated that the Claimant told him that the Claimant was having back problems, and Mr. Carmack stated that the Claimant was forced to take time off of work because of those problems. (TR 103-104) Mr. Carmack continued that a person could not be a hazardous waste coordinator without operating a forklift and handling heavy barrels. (TR 106)

Mr. Carmack stated that he intended to keep the Claimant as an employee at the end of his

contract. (TR 108) Mr. Carmack further stated that the Claimant was a capable employee, but that the back problem occasionally affected the Claimant's ability to perform his job. (TR 109)

Testimony of Eddie Rice

Mr. Eddie Rice, a vocational rehabilitation consultant, testified on behalf of the Claimant at the hearing. Mr. Rice stated that he possesses a masters degree in rehabilitation counseling and a bachelors degree in psychology, as well as being certified in disability management, case management, and being a licensed professional counselor. (TR 112) Mr. Rice met with the Claimant on September 3, 1998. (TR 112) Mr. Rice concluded that, in 1998, the Claimant possessed a 35% vocational disability rating. (TR 120) Mr. Rice concluded that this relegates the Claimant to "lesser types of jobs, earning less money," as well as loss of earning capacity. (TR 122) Mr. Rice admitted on cross-examination that there are not jobs in Alabama that would pay the Claimant the amount of money that he made at Johnston Atoll. (TR 124)

Testimony of Charles Reginald Jones

Mr. Charles Jones testified at the formal hearing held before the undersigned. Mr. Jones is the safety manager at Johnston Atoll. (TR 128) Mr. Jones testified that he is a friend of the Claimant, both professionally and personally. (TR 129) Mr. Jones further testified to the Claimant's strength as an employee. (TR 129) Mr. Jones became aware of the Claimant's back injury in January, 1996. Mr. Jones began an investigation into the forklift seats and what could be done to prevent the accident from happening in the future. (TR 129) Mr. Jones further testified that he knew that the Claimant was leaving Johnston Atoll in September, 1996. (TR 131)

Mr. Jones went on to state that as part of his duties as safety manager, he makes recommendations regarding placement of personnel with certain injuries or limitations. (TR 132) Mr. Jones further testified that he would have accommodated the Claimant's limitations, if the Claimant had asked for such accommodations. (TR 135) Consideration of accommodating the Claimant's condition did not occur because before a determination could be made, the Claimant gave Employer notice of his intention to resign at the end of his contract. (TR 144-45) Mr. Jones went on to state that he would consider the Claimant for potential employment at any point if the Claimant were able to pass the required physical examination. (TR 135) Mr. Jones stated that the position that the Claimant presently holds is the same as the position the Claimant held on Johnston Atoll and that Mr. Jones would have recommended Claimant for that job at Johnston Atoll if the Claimant were able to pass the physical examination. (TR 136) However, Mr. Jones admits that he does not have the power to make hiring decisions and is merely able to make recommendations. (TR 142)

Mr. Jones then testified as to the job requirements of the Claimant's position at Johnston Atoll. Mr. Jones stated that the Claimant would not be required to lift anything weighing over 40 pounds as a part of his position on Johnston Atoll. (TR 137) Mr. Jones stated further that he has no indication that the Claimant's decision was based on anything other that the Claimant's perceived inability to perform his job function. (TR 146)

Claimant's Exhibits

Mr. Eddie Rice issued a vocational evaluation regarding the Claimant on September 30, 1998. (CX 1) Mr. Rice reiterated the Claimant's employment history and medical and physical status. Mr. Rice concluded that based on the Claimant's work and current restrictions, the Claimant sustained a 25% loss of access to jobs at the time of the report. Mr. Rice stated that the Claimant would be likely to earn approximately \$10 per hour in his current state. Mr. Rice concluded that given the Claimant's current restrictions the Claimant would be capable of performing only light duty jobs, such as "cashier, sales clerk, light duty delivery driver, hotel desk clerk, and janitor." Mr. Rice concluded that the Claimant has a 35% vocational loss or disability.

Claimant submitted medical documentation from his time at Johnston Atoll. The record includes several "Reports of Medical History," dated May 1, 1991, May 20, 1992, and May 2, 1995. (CX 2, 3, 6) None of these reports mention any back problem relating to the Claimant. There are also several "Written Physician Opinion" statements contained in the record, dated May 20, 1992, May 4, 1993, May 5, 1994, and May 2, 1995. (CX 3, 4, 5, 7) All of these reports state that the Claimant has no medical conditions that would place the Claimant at risk of "material impairment" and none of these statements recommends that the Claimant have any limitations placed on his work requirements.

Also contained in the record are the Johnston Atoll Health Clinic records relating to the Claimant. (CX 8) These records cover a time period of September 12, 1995 to May 26, 1996. The Claimant reported to the clinic on May 3, 1996, May 10,1996 and May 26, 1996 to receive medical attention for his back ailment. There are also two medical clearance forms contained in the record. (CX 11 12) The first of these reports, dated January 22, 1996, found that the Claimant was not medically cleared to work at that time. The second report, dated February 20, 1996, cleared the Claimant for work, but imposed a limited duty restriction of no lifting over 50 pounds for 2 months.

Included as a part of the record is a physician's report completed by the Claimant and Dr. Angeles. (CX 9) In this report the Claimant states that his injury occurred over a two week period on Johnston Island. The Claimant states further that the injury was caused by "repeated runs from JACADS to area 973 on a 6K lift truck carrying 750 lbs. bombs." The Claimant explained that the "[r]oad was in very poor shape at that time - a dirt road with many potholes." Dr. Angeles diagnosed "left leg swelling of an undetermined etiology." Dr. Angeles also noted that there was no evidence of a pre-existing injury.

Claimant also submitted to this court the short term disability form that Claimant completed on January 12, 1996. (CX 10) The Claimant's injury was described as swelling of the left leg with numbness in the lower back and through the left hip. Claimant explained the cause of the injury in the same way that he explained it in CX 9. At this time, Dr. C. Duayne Randleman, Jr. diagnosed the Claimant as suffering from swelling of the left leg thus impairing the Claimant to the point that Dr. Randleman restricted the Claimant to "no work." The Claimant's final piece of evidence is a facsimile transmission from Chip Jones to Pamela Tarikas at Liberty Mutual Insurance Co. (CX 13) This transmission is a letter regarding the Claimant's injury. Mr. Jones reported that the Claimant's condition had surfaced in the past 6 to 7 months. Mr. Jones further stated that none of the Claimant's physical examinations at Johnston Atoll, nor his military physical examinations reveal any pre-existing back problems. Mr. Jones also states that the Claimant "moves heavy barrels by hand to line them up for the forklift." Mr. Jones added that the access roads the Claimant must travel are dirt and extremely bumpy. Mr. Jones concluded by stating that the Claimant does not receive Veterans Administration compensation for his back.

Employer's Exhibits

Employer submits, on its behalf, the deposition testimony of Perry Lawrence Savage, M.D. (EX 4) Dr. Savage is an orthopaedic surgeon who first saw the Claimant on July 30, 1997. Dr. Savage diagnosed low back pain and lumbar degenerative disk disease. Dr. Savage interpreted the Claimant's January 15, 1996 MRI study as showing "degenerative disk disease changes at L4-5 and L5-S1 with a small midline disk herniation at L5-S1 and circumferential disk bulging at L4-5." Dr. Savage believed Claimant's symptoms to be consistent with the MRI findings. Dr. Savage explained that degenerative changes take years to surface and that all people in their post-teenage years have some degenerative changes.

However, Dr. Savage states that the Claimant's job requirements could have accelerated the degenerative process. Dr. Savage explained that the Claimant has "fairly severe changes at L3-4, some osteophytes, and dried out disks at 4-5 and 5-1." Dr. Savage states that these changes are the source of the Claimant's pain. Numbness in the leg is a symptom consistent with an injury to the low back. Dr. Savage further opines that the Claimant most likely had some preexisting degenerative disk disease and that the jarring that occurred while driving the forklift aggravated the pre-existing injury. Dr. Savage also reviewed the MRI report of Dr. Richard Eichelberger, dated November 10, 1999. Dr. Savage stated that this report was consistent with his 1996 report.

After this examination, Dr. Savage recommended that Claimant temporarily perform only medium duty. The restriction included not lifting over 40 to 50 pounds and no constant bending, twisting or squatting. Dr. Savage stated further that Claimant did not express any prior low back pain, but that the x-ray evidence showed episodes of back pain year prior to 1995. Dr. Savage states that the Claimant's military records show minor low back pain in 1969 and 1980 that was likely secondary to the degenerative changes. This type of problem is usually described as "pulled or sore muscles." However, Dr. Savage cannot rule out that the Claimant's prior back injuries

were in fact nothing more than pulled muscles.

In 1996, Dr. Savage saw evidence of some permanent pre-existing spinal impairment before the aggravating injury. Dr. Savage did not perform a full rating examination, but if he had he would have rated the Claimant as possessing a 10-11% pre-existing impairment, increased approximately 3% post-injury. Dr. Savage states, however, that had he seen the Claimant prior to the Claimant's injury, he would not have warned the Claimant against operating a forklift. Dr. Savage states that "heavy bouncing, banging disk and butt all of the time, can cause some pain and damage."

Dr. Savage examined the Claimant again on January 26, 1998. At that time, Dr. Savage opined that Claimant's condition has improved less than expected. Also at this time, Claimant had more degeneration and bulging and "maybe a little central bulge, which may be a gross herniation, but a central bulge." Dr. Savage clarified that his diagnosis should read "spondylosis" not "spondylolisthesis" as the report states. At this examination, Claimant's neurological examination was within normal range, but pain and numbness do not present on a neurological examination. Dr. Savage concluded that Claimant was not a good candidate for surgical intervention and that Claimant did not need to see Dr. Savage further unless a change occurred in the Claimant's condition.

Zenko J. Hrynkiw, M.D., a board certified neurosurgeon, was deposed on December 12, 1999 in connection with this claim. (EX 5) Dr. Hrynkiw issued a report in this claim on October 27, 1999, with a follow up on November 10, 1999 and an MRI dated November 10, 1999. On October 27, 1999, Dr. Hrynkiw found Claimant's lumbar radiculopathy fairly stable. Dr. Hrynkiw found "degenerative changes as midline disk herniations at 5-1 and protrusions at 4-5." After examining the Claimant's history, Dr. Hrynkiw found that Claimant's MRI was consistent with his history, but the condition could be degenerative. Dr. Hrynkiw also found arthritic changes of longstanding duration. Dr. Hrynkiw opined that the Claimant's pain was aggravated by "mechanical activities of the spine." Dr. Hrynkiw concluded that prior to November, 1995, the Claimant did not have any impairment. Dr. Hrynkiw stated that the Claimant is presently better suited for light duty or sedentary work. Dr. Hrynkiw opined that Claimant had no ratable impairment before November, 1995. Dr. Hrynkiw also found that Claimant had reached maximum medical improvement on October 27, 1999.

The Claimant's Veterans Administration disability award was also submitted to the record in this claim. (EX 6) The Claimant's benefit award became effective on March 1, 1991. Claimant was found to have the following conditions related to his time in military service: hiatal hernia, duodenitits and history of diverticulitis at 10%; tinnitus at 10%; and degenerative joint disease with history of right rotator cuff tear at 10%. These conditions combined for a 30% impairment. The award also states that the evidence did not establish that Claimant suffered from any degenerative condition of the spine. Additionally, Employer submits Claimant's exit interview paperwork as evidence in the above-captioned claim. (EX 8) There is a copy of the Claimant's resignation form dated May 22, 1996. This resignation stated that the Claimant would voluntarily

end his employment on September 20, 1996. Also included in this exhibit is Claimant's exit interview form, dated September 10, 1996. At that time, Claimant stated that he enjoyed working at Johnston Atoll, but that it was "time to go." Claimant had nothing but good things to say about his time spent at Johnston Atoll.

Various medical records regarding the Claimant are also included in the record. (EX 7) Included in this exhibit is an MRI report, dated November 10, 1999. This report notes degenerative changes in Claimant's lower back. Also included in this exhibit is an independent medical examination and follow up report of Zenko J. Hrynkiw. These reports are consistent with Dr. Hrynkiw testimony at deposition. There are also reports from Dr. Savage, dated January 26, 1998, January 28, 1996, and July 30, 1997. Dr. Savage's reports are also consistent with his deposition testimony. There are three physical therapy updates included in the record that cover the time span of August 6, 1997 to August 11, 1997. These updates stated that Claimant's low back pain has improved and that Claimant is able to perform his therapeutic exercises without discomfort, thus progressing according to protocol. The medical records of Johnston Atoll are also included in this exhibit. These records cover a time span of March 25, 1996 through May 10, 1996 and September 12, 1995 through December 27, 1995.

Documentation is also included that medically clears Claimant for duty at Johnston Atoll on February 20, 1996. R. David Boles, M.D., a board certified surgeon, saw Claimant on February 18, 1997. Dr. Boles found that Claimant suffers from severe chronic venous insufficiency of the left leg, and that surgery was not indicated for Claimant. Claimant was also examined by E. Carter Morris, M.D. on January 18, 1996. Dr. Morris is a neurosurgeon. Dr. Morris conducted a MRI study that he interpreted as showing "some degenerative disk disease at L4-5 and L5-S1 with bulging disc at both levels." Dr. Morris stated at that time that no further treatment was required from the doctor unless Claimant experienced some change in his present condition. Included in the EX 7 are an abdominal and pelvic CT scan, a venous doppler and a MRI of the lumbar spine, all dated January 15, 1996. The MRI of the lumbar spine was interpreted as showing "degenerative disc change at L4-5 and L5-S1 with small midline disc herniation at L5-S1 and circumferential disc bulge at L4-5." Employer's exhibits also include duplicates of Claimant's exhibits numbers 2, 4-7, 9 and 11.

RESPONSIBLE EMPLOYER

The Claimant's injury occurred while the Claimant was employed by Raytheon Engineers in November, 1996. Accordingly, Raytheon Engineers is the properly designated responsible employer.

TIMELINESS OF NOTICE

An employee has thirty days to provide notice to the employer of injury or death. 33 U.S.C. § 912. The time limitation begins when reasonable diligence would have disclosed the relationship between the injury and the employment. 33 U.S.C. § 912(a). A presumption exists in favor of sufficient notice of the claim having been given. 33 U.S.C. §912(b). I find that Employer has not submitted evidence sufficient to rebut the presumption contained in § 912(b).

TIMELINESS OF CLAIM

The timeliness of the claim must be considered. The Claimant's timely filing of the claim was not challenged by the Employer. As such, I find that the claim was filed timely.

NATURE AND EXTENT OF DISABILITY

The first issue to determine with respect to the nature and extent of the Claimant's disability is whether the injury is temporary or permanent. A finding that a disability is permanent has several effects. First, in the case of total disability, it allows the addition of a cost of living increase to the Claimant's benefits. *See* 33 U.S.C. § 910(f). Second, only payments by employers made for permanent disability are credited against the 104-week obligation, for purposes of contribution by the Special Fund, under Section 8(f) of the Act. *See* 33 U.S.C. § 908(f). Third, a Claimant's entitlement to benefits for a scheduled disability begins on the date of permanency. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 (1985).

The date on which a Claimant's condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. Trask v. Lockheed Shipbuilding & Constr. Co., 17 BRBS 56, 60 (1985); Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984); Rivera v. National Metal & Steel Corp., 16 BRBS 135, 137 (1984); Miranda v. Excavation Constr., 13 BRBS 882, 884 (1981); Greto v. Arpaia & Chapman, 10 BRBS 1000, 1003 (1979).

In *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994), the Fifth Circuit held that a Claimant is "considered permanently disabled under the Act if he or she has any residual disability after reaching maximum medical improvement, the date of which is to be determined solely by medical evidence and is not dependent on economic factors." In this vein, the court noted that a physician's report of April, 1984 wherein he concluded that "nothing further could be done" for Claimant, marked the date of maximum medical improvement.

A date of permanency may not be based, however, on the mere speculation of a physician. Therefore, a physician's statement to the effect that he "supposed" that he could project a disability rating was rejected as too speculative to support a rating of permanent disability. *Steig v. Lockheed Shipbuilding & Constr. Co.*, 3 BRBS 439, 441 (1976).

It is the medical evidence that determines the start of permanent disability, regardless of economic or vocational considerations. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184, 186 (1988). Thus, a judge must discuss the medical opinions of record regarding permanency, rather than relying on economic factors, such as the loss of a job, a return by the Claimant to employment, or the likelihood of a favorable change in employment. *See Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6, 9 (1984); *Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321, 324 (1983); *Williams v. General Dynamics Corp.*, 10 BRBS 915, 918 (1979).

Likewise, evidence of the ability to do alternative employment is not relevant to the determination of permanency. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

A judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Eng'rs*, 14 BRBS 395, 401 (1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. *See Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). In the absence of any other relevant evidence, the judge may use the date the claim was filed. *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 708 (1978).

On January 18, 1996, Dr. Morris stated that Claimant needed no further treatment unless there was some change in Claimant's condition. On February 20, 1996 Claimant was cleared to work on Johnston Atoll with a two month limited duty restriction. Claimant was then seen on February 18, 1997 by Dr. Boles. At that time, Dr. Boles determined that Claimant required no further treatment unless there was a change in Claimant's condition. Subsequently on July 30, 1997, Dr. Savage determined that Claimant should continue to remain on limited duty restriction. There are also three physical therapy reports covering the time period between August 6, 1997 and August 11, 1997.

On January 26, 1998, Dr. Savage stated that Claimant no longer needed further treatment unless there was some change in Claimant's condition. Dr. Hrynkiw determined that Claimant reached maximum medical improvement on October 27, 1999. Considering all of the above evidence, I find that the Claimant reached maximum medical improvement on January 26, 1998. Up until that time there were efforts to correct Claimant's condition, as indicated by Claimant's light duty restrictions and participation in a physical therapy regimen. However, when Dr. Savage examined Claimant on January 26, 1998, Dr. Savage determined that there was no further

treatment available that would aide Claimant in his recovery. Dr. Hrynkiw examined Claimant in October, 1999 and determined that Claimant reached maximum medical improvement in on October 27, 1999. However, considering that Dr. Savage had more exposure to Claimant during his rehabilitation period, I find Dr. Savage's opinion entitled to more weight. Therefore, I find that Claimant reached maximum medical improvement on January 26, 1998. Accordingly, because Claimant's condition reached maximum medical improvement on January 26, 1998, Claimant became permanently partially disabled as of that date.

Unscheduled permanent partial disability benefits are computed under Section 8(c)(21) by subtracting post-injury wage-earning capacity from the average weekly wage at the time of the injury. Under Section 8(c)(21), unscheduled injuries are compensated as 66 2/3 per centrum of the difference between the average weekly wage and Claimant's post-injury wage earning capacity, payable during the continuance of the partial disability. Post-injury wage earning capacity is set by Section 8(h) at Claimant's actual post-injury earnings, if fair and reasonable; if not, the judge shall fix a fair and reasonable wage-earning capacity pursuant to the factors listed in Section 8(h) and pertinent case law. See generally Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979).

Mr. Eddie Rice determined that Claimant had a post-injury earning capacity of \$10.00 per hour. Mr. Rice bases this finding on the fact that Claimant suffered a 35% vocational loss or disability. I find Mr. Rice's position unpersuasive. This determination is bolstered by the fact that Claimant has procured employment earning more than the hourly wage projected by Mr. Rice. The most reliable evidence with regard to Claimant's post-injury wage-earning capacity was presented by Claimant in his hearing testimony. Claimant testified that when he first began to work after leaving Johnston Atoll, he was employed as a custodian at a rate of \$6.00 per hour. (TR 59) Since that time, Claimant has been working at Westinghouse-Anniston as a control room operator. In that position, Claimant is paid \$20.40 per hour. (TR 62)

There was some testimony by Claimant that his current position at Westinghouse is a temporary position. However, I do not find this evidence to be persuasive as to Claimant's wage earning capacity. I find that Claimant's current salary fairly and reasonably represents Claimant's post-injury wage earning capacity. Pursuant to Section 8(h), I find that Claimant's post-injury wage earning capacity to be \$20.40 per hour for a weekly wage of \$816.00.

COMPENSATION COMPUTATION

The difference between Claimant's post-injury wage earning capacity and his average weekly wage is \$1168.06. Sixty-six and two-thirds of this amount would equal a compensation rate of \$778.63. ⁴ Accordingly, I find that Claimant is entitled to \$778.63 in compensation for the time that Claimant is permanently partially disabled.

SUITABLE ALTERNATIVE EMPLOYMENT

Employer argues that Claimant was returned to suitable alternative employment. However, Employer does not state why such an argument is relevant in the above-captioned claim. This claim is for permanent partial disability payments. Suitable alternative employment is only relevant when the claim presented is for permanent total disability payments.

Suitable alternative employment is relevant once Claimant has established a prima facie case of total disability. At that point, the burden shifts to Employer to show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. If Employer is able to overcome this burden and shows suitable alternative employment, the burden shifts back to Claimant to prove a diligent search and willingness to work. *See Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). If the employee does not prove this, at the most his disability is partial, not total. *See* 33 U.S.C. § 908(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Thus, whether or not Employer has provided Claimant with suitable alternative employment is irrelevant as the above-captioned claim is for permanent partial disability benefits and not permanent total disability benefits.

MEDICAL BENEFITS

"The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). For Claimant to receive medical expenses, the injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). Once an Employer is found to be liable for the payment of disability compensation benefits, that Employer is also liable for medical expenses incurred as a result of the Claimant's injury, pursuant to Section 7(a). *Perez v. Sea-Land Servs., Inc.*, 8 BRBS 130, 140 (1978).

The Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley*

⁴ The parties have stipulated that the maximum compensation rate in effect at the relevant time is \$782.44. The compensation rate to which the Claimant is entitled is below this maximum rate and therefore allowable.

R.R. Co., 13 BRBS 374 (1981). In the process of the litigation of this claim, Claimant has apparently withdrawn the issue of whether his venous insufficiency condition is work-related. If the issue was not withdrawn, I find that Claimant has failed to offer sufficient evidence that the venous insufficiency condition is work-related. As such, the Employer is not liable for medical expenses incurred in treating Claimant's venous insufficiency condition.

Once a physician finds treatment necessary for the work-related condition, Claimant has established a prima facie case for compensable medical treatment. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). In order for a medical expense to be assessed against Employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). It is the Employer's burden to raise the issue of the reasonableness and necessity of the treatment. *Salusky v. Army & Air Force Exchange Service*, 2 BRBS 22, 26 (1975).

Claimant's right to select his own physician is well-settled, pursuant to Section 7(b). 20 C.F.R. § 702.403; *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for the work-related injury. 20 C.F.R. § 702.401(a); *Tough v. General Dynamics Corp.*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978).

The Benefits Review Board has determined that the Claimant's entitlement to the initial free choice of a physician pursuant to Section 7(b) does not negate the requirement of Section 7(d) that the Claimant obtain Employer's authorization prior to obtaining the medical services. Shahady v. Atlas Tile & Marble, 13 BRBS 1007 (1981); rev'd on other grounds, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1983); Banks v. Bath Iron Works Corp., 22 BRBS 301, 307 (1989); Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc., 15 BRBS 299 (1983); Beymun v. Washington Metropolitan Area Transit Authority, 14 BRBS 956 (1982). However, if the Claimant has been refused treatment by the Employer, the Claimant need only establish that the treatment subsequently procured on the Claimant's own initiative was necessary in order to be entitled to such treatment at the expense of the Employer. Atlantic & Gulf Stevedores Inc. v. Neuman, 440 F.2d 908 (5th Cir. 1971); Matthews v. Jeffboat, Inc., 18 BRBS 189 (1986).

It is the Employer's duty to furnish appropriate medical care for the Claimant's low back injury, "and for such period as the nature of the injury or the process of recovery may require." As such, I find that Claimant is entitled to medical benefits for such time that the nature of the injury requires.

SPECIAL FUND RELIEF

Section 8(f) shifts part of the liability for permanent partial and permanent total disability, and death benefits, from the Employer to the Special Fund established by Section 44, when the disability or death is not due solely to the injury which is the subject of the claim. ⁵ Section 8(f) is, therefore, invoked in situations where a work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144, 25 BRBS 85 (CRT) (9th Cir. 1991). Most frequently, the effect of Section 8(f) is to limit the Employer's liability to 104 weeks of compensation; thereafter, the Special Fund makes the compensation payments.

To qualify for Section 8(f) relief, an Employer must make a four-part showing: (1) a pre-existing permanent partial disability; (2) which is manifest to the Employer; (3) the disability must not be due solely to the new injury; and (4) the disability must be materially and substantially greater than that which would have resulted from the new injury alone. 33 U.S.C. § 908(f)(1); Two "R" Drilling Co. Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); Dreyfus Corp. et al v. Director, OWCP, 125 F.3d 884, 31 BRBS 141 (CRT) (5th Cir. 1997); Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 110, 115 (4th Cir. 1982); Director, OWCP v. Edward Mine Co. Inc., 803 F.2d 731, 737 (D.C. Cir. 1996).

Employer must first establish that Claimant suffered from a pre-existing permanent partial disability. The Supreme Court considered the meaning of the word "disability" as used in Section 8(f), and concluded that Congress did not intend to use "disability" as a term of art in Section 8(f). *Lawson v. Suwancee Fruit & Steamship Co.*, 336 U.S. 198, 206 (1949). Existing permanent partial disability under Section 8(f) has been defined as an:

economic disability under $\S8(c)(21)$ or one of the scheduled losses specified in $\S8(c)(1)$ -(20), but it is not limited to those cases alone. 'Disability' under new Section 8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

C & P Tel. Co. v. Director, OWCP (Glover), 564 F.2d 503, 512, 6 BRBS 399 (D.C. Cir. 1977); *overruled by Director, OWCP v. Cargill, 709* F.2d 616 (9th Cir. 1983).

⁵ The Special Fund is not liable for medical benefits, even if Section 8(f) is found to be applicable. *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418 (1983), *rev'd on other grounds sub nom.*, *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295 (4th Cir. 1984); *Scott v. Rowe Machine Works*, 9 BRBS 198 (1978); *Spencer v. Bethlehem Steel Corp.*, 7 BRBS 675 (1978).

To qualify as "pre-existing," the condition must exist before the work-related injury; a disability which occurs simultaneously will not meet the requirement. *See Fineman v. Newport News Shipbuilding & Dry Dock, Inc.*, 27 BRBS 104 (1993) *citing Newport News Shipbuilding & Dry Dock, Inc. v. Harris*, 934 F.2d 548 (4th Cir. 1991); *Director, OWCP v. Bath Iron Works Corp.*, et al, 129 F.3d 45, 31 BRBS 1555 (CRT) (1st Cir. 1997).

In order to qualify as a "pre-existing" injury under Section 8(f), the initial injury or disability must predate the second, employment related injury. *Mikell v. Savannah Shipyard Co.*, 26 BRBS 32, 37 (1992). Rather, "[t]here must exist, as a result of that injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46, 15 BRBS 85 (CRT) (9th Cir. 1991); *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT) (D.C. Cir. 1985).

The fact of a past injury is necessary for Section 8(f) relief. "There must exist, as a result of [the prior] injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46 (9th Cir. 1191); *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222 (D.C. Cir. 1985). However, it is not necessary for the pre-existing disability to have caused an economic loss. *See Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *C & P Telephone v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

Employer alleges that Claimant suffered from a pre-existing injury to his back. ⁶ In support of this proposition, Employer alleges that "Claimant had a history of degenerative joint disease, both hips and spine in a notation in his Army records on July 19, 1990. This evidence is set forth in Claimant's award of disability from the U.S. Department of Veterans Affairs dated July 22, 1991." (EX 4). However, the U.S. Department of Veterans Affairs correspondence to Claimant states specifically that the "evidence does not establish service connection for Degenerative Joint Disease, Cervical Spine, Lumbar Spine, Hips, Knees, Left Elbow and Right Wrist." This is the only notation in the Veterans Affairs correspondence that mentions Claimant's back. This is hardly enough to establish that Claimant had a pre-existing injury to his back. In fact, this correspondence clearly states that there was no evidence of any injury to Claimant's back at the time that he was awarded disability benefits from the U.S. Department of Veterans Affairs.

In addition, Employer advances that Dr. Savages states that

based upon his review of the records, which included x-rays and MRI studies, and his treatment of Claimant, that the activity of riding on a bumpy

⁶ It appears that the Employer may also be alleging that the Claimant's torn right rotator cuff condition qualifies as a pre-existing injury. (EX 4). However, Employer is not clear in advancing this proposition. Employer merely states that "[1]ike the back, [the rotator cuff injury] is an unscheduled injury" under the Act. Because Employer does not advance this proposition with any specificity, it will be addressed no further by this court.

road in a forklift, which gave rise to the cumulative trauma claim to Claimant's lower back, would not have been a factor relevant to Claimant's overall impairment to the back. Dr. Savage further testified that Claimant had preexisting arthritic changes that were aggravated by his work activity consisting of riding on a bumpy road in a forklift. Finally, Dr. Savage testified that Claimant had a preexisting percentage of disability in the 10-11% range and after the industrial 'accident,' was probably increased to 3% or more.

Dr. Savage, in his deposition testimony, states that he did not perform a full rating examination on Claimant when he examined Claimant in 1997. He goes on to state that if he had done such an exam, he would have rated Claimant's condition with a pre-existing impairment of 10-11% and that the accident increased the percentage approximately 3%. I find that Dr. Savage's rating of Claimant 2 years after his examination and after the injury of November, 1995, without completing the full rating examination too speculative to establish that Claimant had a permanent impairment of 10-11% in 1997. See Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976) (a physician's statement to the effect that he "supposed" that he could project a disability rating was rejected as too speculative to support a rating of permanent disability).

Additionally, Dr. Savage states that Claimant's Army records show minor low back pain in 1969 and 1980. (EX 4) Dr. Savage states that these episodes were likely to be secondary to mild degenerative changes and that this condition is often described as a "pulled muscle." However, Dr. Savage later in that deposition states that he cannot say that Claimant's prior back problems were not merely pulled muscles.

Claimant's pulled muscles that occurred while Claimant was enlisted in the United States Army did not result in a lasting physical problem. Such a problem is required to have existed at the time of the new injury. Such is not the case here. There is insufficient evidence to establish that Claimant suffered from an injury to his back prior to his work-related injury of November, 1995.

It is unclear whether Employer is alleging that Claimant's pre-existing condition is the diagnosis of arthritis or whether the Employer is alleging that degenerative changes in Claimant's spine constitute the pre-existing injury. As such, both will be addressed in turn. With regard to arthritic conditions, the Board has held that if the arthritic condition is asymptomatic and the claimant did not miss work, a doctors' testimony can establish that the condition was serious because work restrictions would have been imposed and because claimant was susceptible to further injury. See Carrie v. Cooper Stevedoring Co., 23 BRBS 420, 426 (1990). Dr. Savage clearly states in his deposition testimony that in November of 1995, he would not have advised Claimant to cease driving the forklift at work. Dr. Savage further states that the Claimant's work would not have been restricted and further operation of the forklift would not have been detrimental to Claimant. (See EX 4)

Additionally, Dr. Hrynkiw found that Claimant's objective testing showed evidence of longstanding arthritic changes. However, Dr. Hrynkiw found that Claimant's condition to be stable and did not recommend any restrictions on Claimant's ability to work. Most telling, however, is that Dr. Hrynkiw found that the prior to November, 1995, Claimant suffered from no impairment in his back. (EX 5)

With regard to Claimant's alleged prior back injury, there is also no evidence that supports that a cautious employer would have discharged Claimant. A claimant's failure to completely recover from previous back injuries can provide the support for a finding that the claimant suffered from chronic back pain and disc disease which constituted such a serious disability that a "cautious employer" would have been motivated to discharge him. *Lockheed Shipbuilding V. Director, OWCP*, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991). In this claim, in fact, the Employer states adamantly that Claimant opted to leave Johnston Atoll on his own accord. The Employer would not have terminated Claimant's employer would have discharged Claimant.

Additionally, Claimant was medically cleared to work by Employer's physicians up until the date of Claimant's injury. (*See* CX 2-7) The fact that Claimant was medically cleared at his annual physical examinations is strong evidence of the fact that there was no injury that pre-existed the Claimant's November, 1995 injury. As such, I find that Employer has failed to establish that Claimant suffered from pre-existing permanent partial disability.

Secondly, Employer must establish that the pre-existing permanent partial disability was manifest to Employer. The requirement that a Claimant's pre-existing disability must be manifest to the Employer is not a statutory requirement of Section 8(f) but has been added by the courts. *American Mutual Ins. Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). The regulations have contained the requirement since 1985. 20 C.F.R. § 702.321(a).

A useful function of this requirement is that it insures that a disability actually pre-existed the second injury. Although this function would be served if medical records sufficed to establish a condition that would deter a cautious employer from hiring or encourage a cautious employer to terminate the worker because of increased risk of compensation liability, the Administrative Review Board has held that "a post hoc diagnosis of a pre-existing condition, even a diagnosis based only on medical records in existence prior to the date of injury, is insufficient to meet the manifest requirement." *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 99 (1991); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984) (post injury re-reading of pre-injury x-rays showed changes consistent with asbestosis, but no findings specific for asbestosis).

If an employer does not have actual knowledge of the pre-existing disability, constructive knowledge will satisfy the requirement. Constructive knowledge may be proved from medical records in existence at the time of the subsequent injury from which the condition was objectively

determinable. *Director, OWCP v. Universal Terminal & Stevedoring (DeNichilo)*, 575 F.2d 452, 457, 8 BRBS 498 (3rd Cir. 1978). The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest, so long as there is sufficient information that might motivate a cautious employer to consider terminating the employee because of the risk of compensation liability. *Topping v. Newport News Shipbuilding & Dry Dock*, 16 BRBS 40, 43-44 (1983). An employer need not be absolutely sure that the condition is permanent; its permanence may be uncertain, and yet cause a cautious employer to discriminate. *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 80-83 (1st Cir. 1992).

The pre-existing disability need not be manifest at the time of hiring, but only at the time of the compensable subsequent injury. *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619, 16 BRBS 137 (CRT) (9th Cir. 1983) (*en banc*). There are many analogous cases that support a finding that Claimant's pre-existing permanent partial disability was not manifest to the Employer in the above-captioned claim. Where a worker's pre-injury medical reports established episodes of shoulder and neck pain but did not contain a specific diagnosis of cervical spondylpathy or any other cervical disease, the reports did not satisfy the manifest requirement. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 99-100 (1991). Medical records which showed that the claimant had minimal spinal degeneration which was not medically significant, no worse than normal, and present in most people his age, did not meet the manifest requirement because they did not establish that the claimant had a disability. *Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990). Where x-ray reports showed abnormalities but did not result in the diagnosis of a particular disease, no disease was manifest. *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 1224, 22 BRBS 11 (CRT) (5th Cir. 1989).

In each of the aforementioned cases, there was some evidence that existed that could have indicated to the employer that a pre-existing injury existed. In those cases however, the injury was not manifest to the employer. In the above-captioned claim, there was no evidence available to Employer of a pre-existing injury. Claimant's Army medical records would not have revealed any condition that related to Claimant's back. The Veterans Affairs findings clearly indicate that as far as the Army was concerned, Claimant did not suffer from any back condition. Additionally, Employer's physicians had the opportunity, annually to examine Claimant. At no time before the November, 1995 injury did any physician indicate that Claimant possessed a pre-existing injury. Therefore, Employer has failed to establish that a pre-existing permanent partial disability was manifest to the Employer.

Thirdly, Employer must establish that the disability was not due solely to the new injury. As stated above, it is clear that Employer is unable to meet this element. Considering the aforementioned evidence that Claimant's disability is due solely to the new injury. Therefore, Employer has failed to meet the third element necessary for the imposition of Section 8(f) relief.

The final element that Employer must establish is that the disability must be materially greater than that which would have resulted from the new injury alone. Where a claimant is permanently partially disabled, employer must also prove that the claimant's current level of

disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908 (f)(1). In the case of permanent partial disability Employer need only show that an increased permanent partial disability resulted when the prior and subsequent injuries are combined. *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d at 307. Considering that Employer has failed to establish that a pre-existing injury was present in the above-captioned claim, it is impossible for the two injuries to have combined to make Claimant's disability materially greater than what would have resulted from the new injury alone. Accordingly, I find that Employer has failed to meet the fourth prong necessary to establish entitlement to Section 8(f) relief. Employer has failed to meet any of the required elements and as such, is not entitled to relief from the Special Fund, as prescribed in Section 8(f).

INTEREST

Although the Act does not provide for interest to be paid on past due benefits, the courts and the Administrative Review Board have upheld interest awards as consistent with the Congressional purpose of making claimants whole for their injuries. *Watkins v. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979). A claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins*, 594 F.2d at 989. The rate of interest to be computed is the rate used by the United States District Courts under 28 U.S.C. § 1961 (1982).

Interest is mandatory and cannot be waived in a contested claim. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). The Administrative Review Board has held that the date that employer knows of an injury, an obligation is incurred to pay benefits under 33 U.S.C. § 914(b). The date that employer knows of the injury is critical in determining the onset date for the accrual of interest. *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996).

Employer knew of the Claimant's injury on January 12, 1995 and did not initiate the payment of benefits. As such, interest begins to accrue fourteen (14) days thereafter, from January 26, 1995.

ATTORNEY'S FEES AND COSTS

Thirty days (30) is hereby allowed to Claimant's counsel for the submission of an application for representative's fees and costs. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all of the parties, including Claimant, must accompany the application. All parties have fifteen (15) days following the receipt of any such application within which to file any objections to the application.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the record as a whole, the following shall become the final order of this court. Any specific numeric computations of the compensation award shall be performed by the District Director.

IT IS ORDERED THAT

- 1. The Claim of James T. Sullivan for partial permanent disability benefits is hereby GRANTED.
- 2. Raytheon Engineers is to pay to James T. Sullivan permanent partial disability benefits in accordance with Section 8(c) of the Longshore and Harbor Workers' Compensation Act based on an average weekly wage of \$1,168.06, for a compensation rate of \$778.63.
- 3. The permanent partial disability benefits to which James T. Sullivan is entitled shall begin on the date of maximum medical improvement, January 26, 1998 and continue until such time that Mr. Sullivan's condition ceases to be permanently and partially disabling.
- 4. Raytheon Engineers shall furnish James T. Sullivan with medical benefits for such period as the nature of the injury may require.
- 5. Raytheon Engineer's claim for Section 8(f) relief is hereby DENIED.
- 6. Interest shall be computed from January 26, 1998 and paid to James T. Sullivan by Raytheon Engineers.

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ROBERT J. LESNICK Administrative Law Judge

RJL/jbm/lab